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The Tribes Must Regulate: Jurisdictional, Environmental, and Religious Considerations of Hydraulic Fracturing on Tribal Lands

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I. INTRODUCTION

Tex Hall, the chairman of the Three Affiliated Tribes, says that the federal government must be prohibited from regulating hydraulic fracturing. "If this is not done, our oil and gas production on our reservation will cease. It's that simple."[1]

A Blackfeet woman prepares to show a documentary film on the environmental dangers of oil and gas drilling on the Blackfeet Reservation, including impacts on air, water, and wildlife. "I guess you just have to weigh [the promise of jobs created by oil and gas development] against the bigger picture."[2]

Sacred sites are places where Native Americans can "channel the physical and spiritual manifestations of their beliefs," but when sacred sites are on federal public lands, agency decisions can destroy the attributes which make lands sacred, and thus, the ability of the people to practice their religions.[3] *Not all Indians agree that protection of sacred lands must prevail over economic interests. When asked about tribal concerns over drilling for oil and gas on sacred lands on the Blackfeet Reservation on the Rocky Mountain Front in Montana, Ron Crossguns, an employee of the Blackfeet tribe's oil and gas department recently declared, "They're just big rocks, nothing more. Don't try to make them into nothing holy. Jesus Christ put them there for animals to feed on, and for people to hunt on."*[4]

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1. Eloise Ogden, *Tex Hall: Proposed Fracking Regs Will Hurt Energy Development on Reservations,* MHA NEWS (Mar. 30, 2012), http://www.mhanation.com/main2/Home_News/Home_News_2012/News_2012_03_March/news_2012_march30.html.

2. Dan Testa, *'Fracking' Ramps Up on Blackfeet Reservation,* FLATHEAD BEACON (Aug. 17, 2011), http://www.flatheadbeacon.com/articles/article/fracking_ramps_up_on_blackfeet_reservation/24296.

3. Joel Brady, *"Land Is Itself a Sacred Living Being": Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of* Bear Lodge, 24 AM. INDIAN L. REV. 153, 156 (1999–2000).

4. Jack Healy, *Tapping Into the Land, and Dividing Its People,* N.Y. TIMES (Aug. 15, 2012), http://www.nytimes.com/2012/08/16/us/montana-tribe-divided-on-tapping-oil-rich-land.html?pagewanted=all.

Tribal lands are a potentially lucrative source of energy and economic resources, but they are largely undeveloped,[5] and many tribes remain "resource-rich and cash-poor."[6] According to the most recent analysis, Indian lands account for a little more than 1% of total natural gas production, 2.5% of total natural gas plant liquids production, less than 1% of sales of total crude oil production, and 2% of total coal production in the United States—statistics which consider state, Indian, federal onshore, and federal offshore lands.[7] Thus, there is much opportunity for growth; Indian lands constitute only 5% of total land area in the country,[8] but experts estimate that up to 10% of the nation's untapped energy resources lie on or under these lands.[9]

A complex relationship with the federal government, which regulates oil and gas production on tribal lands, are the tribes' most significant hindrance to energy development. The federal government imposes a complex, lengthy, and expensive procedure on those who wish to lease tribal lands, whereas states impose

5. Elizabeth Ann Kronk, *Tribal Energy Resource Agreements: The Unintended "Great Mischief for Indian Energy Development" and the Resulting Need for Reform*, 29 PACE ENVTL. L. REV. 811, 813 n.11 (2012).

6. John Kemp, *Tribes Call for Faster Drilling on Indian Lands*, REUTERS (Feb. 5, 2013, 10:03 AM), http://www.reuters.com/article/2013/02/05/column-kemp-oilgas-indian-lands-idUSL5N0B5A9W20130205.

7. The statistics quoted above were derived from tables published by the United States Energy Information Administration. See U.S. ENERGY INFO. ADMIN., SALES OF FOSSIL FUELS PRODUCED FROM FEDERAL AND INDIAN LANDS, FY 2003 THROUGH FY 2011,. app. A, (2012), *available at* http://www.eia.gov/analysis/requests/federallands/pdf/eia-federallandsales.pdf, for more information on fossil fuel sales from Indian lands, onshore federal lands, and offshore federal lands. Indian lands account for 5% of natural gas production, 3% of natural gas plant liquid production, 3% of crude oil production, and 5% of coal production on federal and Indian lands. *Id.* at 3–5. However, these statistics are a little deceptive when considering *total* national production, because federal and Indian lands account for only 32.3%, or 18,596 trillion BTUs, of total fossil fuel production in the United States. Those statistics do not consider state lands, where most fossil fuel production takes place. See U.S. ENERGY INFO. ADMIN, MONTHLY ENERGY REV., 5 (2013), *available at* http://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf, for reports on total fossil fuel production in the United States. In 2011, there were 60,583 trillion BTUs of fossil fuels produced on Indian, federal, and state lands, combined.

8. Kronk, *supra* note 5, at 814.

9. Subcommittee on Indian and Alaska Native Affairs, NAT. RESOURCES COMMITTEE, *available at* http://naturalresources.house.gov/subcommittees/subcommittee/?SubcommitteeID=5066 (last visited Oct. 27, 2012).

comparatively few restrictions.[10] By illustration, a Ute tribal representative explains that the Bureau of Land Management ("BLM"), the federal agency regulating oil and gas leases on Indian lands, requires a forty-nine step process to approve a single well, completion of which can take anywhere from ninety to 480 days.[11] By contrast, it takes ten days to receive a permit to drill on North Dakota state lands, fourteen days in Ohio, and twenty-seven in Colorado.[12] Additionally, the costs are higher for tribes than for states; BLM charges $6,500 for each application—in contrast, Montana charges just $75.[13] The complex application process and high fees result in companies preferring to drill on private or state-owned lands instead of on Indian lands, eliminating tribes' opportunities to participate in the oil and gas boom caused by advancements in fracking technology.[14]

Thus, oil- and gas-producing tribes have greater obstacles to developing their resources than states and other entities, but the disparity has recently expanded with the rising popularity of a new extraction method—hydraulic fracturing. Hydraulic fracturing, or *fracking*, is a process of extracting oil, gas, or geothermal energy by horizontally pumping fluids, commonly water and additives, into rock at high pressures.[15] The fluids open or enlarge fractures in the rock, allowing minerals to flow freely from the tight rock into production wells on the surface.[16] The pressure of the geologic formation causes the fluids to rise to the surface where it is disposed, recycled, or re-injected into the ground.[17] Fracking is "absolutely necessary to profitably develop oil and gas from shale

10. *See infra* Part II.

11. Kemp, *supra* note 6.

12. *U.S. Oil Production Up, But on Whose Lands?*, INST. FOR ENERGY RES. (Sept. 24, 2012), http://www.instituteforenergyresearch.org/2012/09/24/u-s-oil-production-up-but-on-whose-lands-2/.

13. Kemp, *supra* note 6.

14. *Id.*

15. *See, e.g.*, Thomas Swartz, *Hydraulic Fracturing: Risks and Risk Management*, 26 NAT. RESOURCESS & ENV'T 30, 30 (2011).

16. *Hydraulic Fracturing Background Information*, E.P.A., http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm (last visited Oct. 29, 2012).

17. *Id.*

rock formations"[18] because otherwise, natural resources are too difficult to extract from the tight rock.

Unconventional drilling techniques such as fracking can potentially make the United States a net exporter of energy.[19] For instance, the nation is sitting on top of a one hundred year supply of natural gas, which will increase domestic energy supplies, reduce greenhouse gas emissions, and reduce dependence on foreign energy sources.[20] Fracking has led to prosperity in states such as North Dakota, where fracking has spurred an oil boom, giving North Dakota the lowest unemployment rate in the country.[21] Tribes can potentially share in these economic successes. For example, the Blackfeet in northern Montana is a tribe with oil and gas reserves under their reservation. Until about five years ago, it was generally believed that the reservation did not hold enough resources to make drilling profitable,[22] however, fracking is expected to change that. So far, drilling on the reservation has been exploratory, meaning that no oil has been extracted yet,[23] but the eastern part of the reservation lies on top of the profitable Bakken shale formation.[24] It is estimated that there are 3.65 billion barrels of undiscovered oil in the Williston Basin in the Bakken shale, and while it is unknown how much oil and gas lie underneath the Blackfeet Reservation itself, energy may hold the key to economic development on the reservation.[25]

18. David E. Pierce, *Developing a Common Law of Hydraulic Fracturing*, 72 U. PITT. L. REV. 685, 685 (2011).

19. Patti Domm, *US is on Fast-Track to Energy Independence: Study*, CNBC (Feb. 11, 2013), http://www.cnbc.com/id/100450133.

20. Terry W. Roberson, *Environmental Concerns of Hydraulically Fracturing a Natural Gas Well*, 32 UTAH ENVTL. L. REV. 67, 68 (2012).

21. *See, e.g.*, Matthew Rocco, *North Dakota Oil Boom Driving Economic Development*, FOX BUS. (Feb. 11, 2013), http://www.foxbusiness.com/economy/2013/02/11/north-dakota-oil-boom-driving-economic-development/.

22. Tom Fredericks & Andrea Aseff, *When Did Congress Deem Indian Lands Public Lands?: The Problem of BLM Exercising Oil and Gas Regulatory Jurisdiction in Indian Country*, 33 ENERGY L.J. 119, 121 (2002).

23. Testa, *supra* note 2.

24. *Interest Grows in Oil, Gas on Mont. Reservation*, ASSOCIATED PRESS (Aug. 12, 2011), http://billingsgazette.com/news/state-and-regional/montana/interest-grows-in-oil-gas-on-montana-reservation/article_eb0284f8-c53d-11e0-9ebf-001cc4c03286.html.

25. *Id.*

For many impoverished tribes, development of natural resources can be a lifeline. As just one example of the economies of tribes, the unemployment rate on the Blackfeet reservation is close to 70%.[26] Energy production is a potential avenue for tribes to decrease unemployment and alleviate poverty. It will give tribes an opportunity to diversify their economies, generate revenue, and create jobs.[27] It can also fulfill tribes' own energy needs on the reservation.[28] Further, this will allow tribes to exercise increased sovereignty by having more control over land use decisions on the reservation;[29] they will be able to make decisions aligned with their environmental and religious needs.

However, none of these benefits can be fully realized as long as the federal government imposes complex bureaucratic regulations on those who wish to drill on tribal lands. An ill-conceived new proposal to increase federal oversight over fracking will hinder energy development on tribal lands. On May 11, 2012, BLM proposed a rule ("proposed BLM rule") that would require disclosure of chemicals used in fracking on public and Indian lands.[30] The proposed rule would require (1) the public disclosure of all the chemicals used in fracking operations on federal and tribal lands, (2) confirmation that wells used in fracturing operations meet appropriate construction standards, and (3) a requirement that operators put in place appropriate plans for managing flowback[31] waters from fracking operations.[32]

This proposed rule must be rewritten to exempt Indian lands, and instead, the federal government must empower tribes to regulate fracking for the following three reasons which will be explored in this Comment: (1) it undermines current theories on the relationship between the United States government and tribes, and

26. Testa, *supra* note 2.

27. Kronk, *supra* note 5, at 840.

28. *Id.* at 841.

29. Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 UTAH ENVTL. L. REV. 1, 2 (2012).

30. Oil and Gas; Well Stimulation, Including Hydraulic Fracturing on Federal and Indian Land*s*, 43 Fed. Reg. 3160 (May 5, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-05-11/pdf/2012-11304.pdf.

31. EPA, *supra* note 16. Flowback waters are the injected fluids that rise to the surface once oil and gas are extracted from rock. They commonly consist of water and chemicals.

32. 43 C.F.R. § 3160 (2010).

is thus, improper, (2) federal agencies are ill-equipped to handle environmental regulation on tribal lands, and (3) tribes better understand religious concerns of fracking on tribal lands. This solution is consistent with congressional policies of increasing tribes' abilities to govern themselves, will ensure that the environment is properly regulated on reservations, and will more properly ensure the protection of sacred sites that may be impacted by fracking. Part II of this Comment begins by explaining the trust relationship between the federal government and Indian tribes and explains why it contributes to minimal oil and gas production on tribal lands. Part III lists some of the environmental laws that affect oil and gas development and how they are enforced on tribal lands, ultimately concluding that on tribal lands, these laws have been ineffective. Part IV adds one more dimension—when lands held sacred by Native American are destroyed, the end result can be devastating to Indian culture and religion. Part V concludes, reinforcing the Comment's central thesis that instead of adding regulatory burdens to tribes, the federal government should fund tribes so that they can set up their own fracking rules. This way, Congress can bolster tribal sovereignty and tribes can regulate fracking in ways that would remain sensitive to their religious and environmental needs.

II. JURISDICTIONAL CONSIDERATIONS OF FRACKING ON TRIBAL LANDS

When Tex Hall, chairman of the Three Affiliated Tribes, said that oil and gas production will cease on his reservation if the federal government regulated fracking,[33] he emphasized that federal regulation would result in even more bureaucratic hurdles for prospective lessees on tribal lands. A complex trust relationship between tribes and the federal government imposes many bureaucratic hurdles on those who wish to extract minerals on tribal lands. However, the federal government's recent movement towards allowing tribes self-determination and self-governance should ease the burdens associated with the trust relationship. The proposed BLM rule halts recent efforts to realize these effects and therefore should not be adopted. Part II.A will explain the trust relationship and the doctrines of tribal self-determination and self-governance, ultimately arguing that tribes must be empowered to have increased

33. *See supra* Part I.

authority over oil and gas leasing on their lands. This Part will also outline relevant federal statutes and their shortcomings in empowering tribes to control their resources. Part II.B will argue that fracking on tribal lands should not be federally regulated because tribal regulation is desirable for practical reasons and because federal regulation of fracking flies in the face of Congress's intent to encourage self-governance by tribes.

A. Tribal-Federal Trust Relationship Inhibits Development of Natural Resources

The complex relationship between the federal government and Indian tribes has resulted in an even more complex division of authority in oil and gas regulation on tribal lands.[34] It is imperative to determine ownership of mineral resources in order to understand who can regulate on tribal lands.[35] There are three major categories of land ownership on reservations. They can be: 1) held in fee by Indian tribes, 2) held in fee by non-Indians, or 3) held in trust by the federal government. Each of these lands is regulated differently, and the history of Indian lands will help clarify the distinctions.

1. Three types of land ownership on reservations

Early in the nation's formation, official policy was focused on moving tribes westward to make room for white settlement.[36] In the middle of the nineteenth century, the focus shifted to reserving areas for tribes, which became known as "reservations."[37] The reservations remained the official policy until 1887, when Congress passed the General Allotment Act, dissolving the reservation system and granting individual Native Americans parcels of land.[38] The allotment policy was a disaster for Indians because white settlers, taking advantage of Indians' lack of knowledge about land

34. *Tribal Law*, INTERMOUNTAIN OIL & GAS BMP PROJECT, http://www.oilandgasbmps.org/laws/tribal/ (last visited Apr. 7, 2013).

35. *Id.*

36. Judith V. Royster, *Mineral Development in Indian County: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 545 (1994).

37. *Id.* at 546.

38. Alexis E. Applegate, Note, *Tribal Authority to Zone Nonmember Fee Land Using the First Montana Exception: A Game of Checkers Tribes Can Win*, 40 B.C. ENVTL. AFF. L. REV. 159, 160 (2013).

ownership, purchased former reservation land en masse.[39] In 1934, the allotment period officially ended, and Congress created new reservations for tribes that had lost their land, added land to reservations that were still intact after white settlement, and restored tribal ownership to lands which had not been sold off to white settlers.[40] In 1953, the government changed its stance once again by eliminating reservations, though they were reinstated in 1968.[41]

As a result of the allotment policy, approximately two-thirds of the total lands allotted were transferred from Indian hands to non-Indian settlers.[42] The modern-day result of the allotment policy is a "checkerboard of land ownership between tribal land and nonmember lands,"[43] as non-Indian fee lands are interspersed between Indian fee lands and trust lands. Mineral rights to these lands depend on the specific allotment.[44] Some allottees acquired all surface and subsurface rights, while others' subsurface rights were contingent on congressional control.[45]

However, only a small percentage of tribal lands are owned in fee by either Indians or non-Indians.[46] Most lands on reservations are held in fee by the United States, which takes title to the land in trust for the tribe that occupies the area.[47] This Comment will limit its scope to lands held in trust because trust lands make up the majority of Indian lands where fracking is an issue—although distinctions between fee lands and trust lands will be discussed where the distinctions are relevant. The foundations of the trust relationship were laid out in two nineteenth century cases: *Cherokee Nation v.*

39. *Id.*

40. *Id.* at 166.

41. *Id.*

42. Royster, *supra* note 36, at 550.

43. Applegate, *supra* note 38, at 160.

44. Royster, *supra* note 36, at 548–49.

45. *Id.*

46. GEORGE RUSSELL, THE AMERICAN INDIAN DIGEST, D-1 (1993), *available at* http://www.fs.fed.us/people/tribal/tribexd.pdf. From the 55 million acres of federally recognized Indian reservations, 44 million are tribal trust lands, and 11 million are held in fee. Some reservations are totally tribal trust lands, and others are owned entirely by individuals. For example, the Navajo reservation encompassing Utah, Arizona, and New Mexico is 95% trust lands and the Uintah reservation in Utah is 99% trust lands, but the Blackfeet reservation in Montana is 32% trust lands.

47. Royster, *supra* note 36, at 546.

Georgia[48] and *Worcester v. Georgia*.[49] In *Cherokee Nation*, the Supreme Court held that the Indian tribes were not foreign states within the meaning of the constitution,[50] but rather, "domestic dependent nations"[51] that have an "unquestionable . . . right to the lands they occupy."[52] They have a relationship with the United States resembling a "ward to his guardian."[53] One year later, in *Worcester v. Georgia*, the Court held that state laws have no bearing on Indian lands, and that "[t]he whole intercourse between the United States and this [Indian] nation, is by our constitution and laws, vested in the government of the United States."[54]

Cherokee Nation and *Worcester* taken together stand for the proposition that the federal government, and not state governments, owes Indian tribes external protection.[55] This external protection is a trust relationship provided in the Indian General Allotment Act: "The United States does and will hold the land thus allotted . . . in trust for the sole use and benefit of the Indian to whom such allotment shall have been made."[56] The trust relationship includes "a special government-to-government relationship with Indian tribes, including the right of the tribes to self-governance."[57] As domestic dependent nations, Indian tribes possess all the aspects of sovereignty unless Congress uses its plenary powers to take this sovereignty away by a treaty or an Act of Congress.[58]

The trust relationship has been used to justify both the federal government's preferential treatment of tribes and its overbearing and paternalistic treatment of Indians.[59] Because the federal government acts as a trustee, it has extensive control over natural resources on

48. 30 U.S. 1 (1831).

49. 31 U.S. 515 (1832).

50. 30 U.S. at 8.

51. *Id* at 17.

52. *Id.*

53. *Id.*

54. *Worcester*, 31 U.S. at 520.

55. Kronk, *supra* note 5, at 825.

56. 25 U.S.C. § 331 (2006).

57. Indian Self-Determination Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250, 4270–77 (1994).

58. United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324 (2011); United States v. Wheeler, 435 U.S. 313, 323 (1978).

59. Brett J. Stavin, Comment, *Responsible Remedies: Suggestions for Indian Tribes in Trust Relationship Cases*, 44 ARIZ. ST. L.J. 1743, 1743 (2012).

tribal lands.[60] Sometimes, in carrying out its fiduciary duties, the government has acted with carelessness or in bad faith.[61] The Supreme Court evaluated whether there is a cause of action against the government for violating its trust duties and has come up with somewhat of a bright-line rule, which reflects a gradual diminution of the government's fiduciary obligations to Indian tribes.[62] In *United States v. Mitchell*, the Court held that a general statute, such as the Indian General Allotment Act, established merely a "bare trust" relationship, and the United States has no affirmative duty to manage coal leasing to the benefit of the tribes.[63] However, if the United States assumes "elaborate control over [natural resources] and property belonging to Indians" under a more specific statute, then "a fiduciary relationship necessarily arises" that is enforceable by an award of damages.[64]

2. Regulation of minerals on tribal lands

The proper regulatory authority for mineral rights depends on whether the reservation land is held in fee by Indians, by non-Indians, or in trust. In general, tribes have the sole authority to lease mineral rights on lands that they own in fee because Indian lands are not public lands that normally would be controlled by the federal government under the Mineral Leasing Act of 1920.[65] Tribes may exercise authority over non-Indians living on fee lands only when non-Indian conduct threatens or has direct effect on tribal sovereign interests or if non-Indians enter consensual contracts or leases with tribes.[66] Tribes have no jurisdiction over land held in fee by non-Indians.[67]

Surface mineral rights on lands held in trust are regulated by the Department of the Interior, through the Bureau of Indian Affairs,

60. *Id.*

61. *Id.* at 1744.

62. *Id.* at 1761–65.

63. United States v. Mitchell, 463 U.S. 206, 224 (1983) (construing United States v. Mitchell, 445 U.S. 535 (1980)).

64. *Id.* at 225.

65. Tanana & Ruple, *supra* note 29, at 35. *See* 30 U.S.C. § 226 (2012). The Mineral Leasing Act states that "[a]ll [federal] lands . . . which are known or believed to contain oil or gas deposits may be leased by the Secretary." *Id.*

66. Montana v. United States, 450 U.S. 544, 565–66 (1981).

67. Plains Commerce Bank v. Long Family Land & Cattle Co., 544 U.S. 316, 338 (2008).

and subsurface rights are regulated by the BLM.[68] Regulations for onshore oil and gas operations for lands held in trust are outlined in the Code of Federal Regulations[69] and include regulations promulgated from federal statutes relevant to Indian tribes such as the Indian Mineral Leasing Act of 1938,[70] the Federal Oil and Gas Royalty Management Act,[71] and the Indian Mineral Development Act of 1982.[72]

3. Federal statutes regulating oil and gas leasing on tribal lands are largely ineffective

Recently, Congress has tried to enact laws which give tribes more regulatory authority over mineral rights on their lands. These efforts are part of a broader congressional policy of tribal self-determination, a concept that was initiated in the late 1960s.[73] This policy encourages self-governance and has been manifested in laws such as the Indian Self-Determination Act of 1975, a statute that provides tribes with federal funding to administer government services to their members.[74] Self-determination and self-governance remain the official policies of Congress, and today, a large portion of federal appropriations for tribal programs are distributed to the tribes to administer such programs on their own.[75]

Despite Congress' policy of self-determination, tribes have inadequate control over their natural resource development, especially in relation to fracking. In 2005, Congress passed Title

68. Fredericks & Aseff, *supra* note 22, at 123.

69. 43 C.F.R. § 3160 (2010). *available at* http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title43/43cfr3160_main_02.tpl.

70. 25 U.S.C. § 396(a) (2006) ("[U]nallotted lands within any Indian reservation . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes.").

71. 30 U.S.C. § 1701(b)(2) (2012) ("It is the purpose of this chapter . . . to clarify, reaffirm, expand and define the authorities and responsibilities of the Secretary of the Interior to implement and maintain a royalty management system for oil and gas leases on . . . Indian lands.").

72. 25 U.S.C. § 2102 ("Any Indian tribe, subject to the approval of the Secretary . . . may enter into any joint venture, operating, production sharing, service, managerial, lease or other modification of such agreement . . . providing for the exploration for, or extraction, processing, or other development of, oil, gas . . . .").

73. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 779 (2006).

74. *Id.*

75. *Id.* at 780–81.

XXVI to the 2005 Amendments to the Energy Policy Act of 1992,[76] which established the Indian Energy Resource Development Program.[77] The purposes of the program are to "assist Indian tribes in the development of energy resources and further the goal of Indian self-determination."[78] The Secretary of the Interior accomplishes these purposes by providing grants "for use in developing or obtaining the managerial and technical capacity needed to develop energy resources on Indian land,"[79] "for use in carrying out projects to promote the integration of energy resources,"[80] and "to establish a national resource center to develop tribal capacity to establish and carry out tribal environmental programs in support of energy-related programs and activities."[81] The Secretary also provides low-interest loans "for the promotion of energy resource development on Indian land."[82]

Most importantly, the Amendments established the Indian Tribal Energy Development and Self-Determination Act ("ITEDSA"), which eliminates Secretarial approval for leases.[83] Tribes must enter into a Tribal Energy Resource Agreement ("TERA") with the Secretary of the Interior in order to qualify.[84] The Secretary must approve the TERA and ensure that tribes have a comprehensive environmental regulatory scheme similar to the National Environmental Policy Act, which does not apply to Indian lands.[85]

However, ITEDSA has yet to encourage tribal self-determination. As of yet, no tribes have taken advantage of ITEDSA. There are a few possible explanations for this. One explanation is that the Secretary of the Interior will only approve a TERA if the tribe meets several prerequisites, such as establishing requirements for environmental review that mirror the rather cumbersome requirements of the National Environmental Policy Act.[86] Another explanation is that

76. 42 U.S.C. §§ 13201–13574.
77. 25 U.S.C. §§ 3501–3506.
78. 25 U.S.C. § 3502(a)(1).
79. *Id.* § 3502(a)(2)(A).
80. *Id.* § 3502(a)(2)(B).
81. *Id.* § 3502(a)(2)(D).
82. *Id.* § 3502(a)(2)(C).
83. *Id.* § 3504.
84. *Id.*
85. Kronk, *supra* note 5, at 817.
86. *Id.*

ITEDSA holds that "the United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms of, a lease, business agreement, or right-of-way executed pursuant to and in accordance with a [TERA]."[87] In other words, tribes can be sued by outside parties regarding mineral leases. This is unattractive to tribes, who believe, in the words of a Southern Ute attorney, that opening up tribal decisions to citizen suits will contradict "[t]raditional notions of tribal sovereignty [that] protect tribes from incursion of . . . non-members in the decisionmaking process."[88] Finally, another explanation includes claims that Indian tribes do not have sufficient money or expertise to enter into TERAs.[89] While the statute directs the Secretary to provide development grants to tribes, the way it stands now, the grants may not be enough to overcome lack of financing.[90]

Congress is aware of the problems associated with ITEDSA and has made several proposals to ease the burdens of TERAs. The Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012,[91] which was signed into law by President Obama in late July 2012,[92] is intended to expedite the leasing of certain lands without Secretarial approval or TERAs—but it excepts "a lease for the exploration, development, or extraction of any mineral resources."[93] Thus, it does not apply to fracking of oil and natural gas.[94] In September 2012, the ITEDSA Amendments of 2012 were passed by the Senate's Indian Affairs Committee.[95] These

87. 25 U.S.C. § 3504.

88. Kronk, *supra* note 5, at 831.

89. Benjamin J. Fosland, *A Case of Not-So-Fatal Flaws: Re-evaluating the Indian Tribal Energy Development and Self-determination Act*, 48 IDAHO L. REV. 447, 454 (2012).

90. *Id.*

91. H.R. 205, 112th Cong. (2012).

92. Jodi Gillette, *Strengthening Tribal Communities Through the HEARTH Act*, WHITEHOUSE.GOV (July 30, 2012), http://www.whitehouse.gov/blog/2012/07/30/strengthening-tribal-communities-through-hearth-act.

93. H.R. 205 (h)(1), 112th Cong. (2012) (enacted).

94. *See* Judith V. Royster, *Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures*, 31 STAN. ENVTL. L.J. 91, 98 (2012) ("Congress has consistently been explicit that all fossil fuels are included within the mineral development statutes, and a statutory definition trumps a scientific definition for purposes of law. Consequently, the term "mineral" in Indian law is routinely used to include oil and natural gas.").

95. Adam Voge, *Indian Energy Bill, Introduced by Wyoming Senator, Heads to Senate*, STAR-TRIB. (Sept. 19, 2012), http://trib.com/business/energy/indian-energy-bill-introduced-by-

amendments would allow for certain actions to be excluded from environmental reviews and provides that tribes do not necessarily need to have sufficient capacity to develop resources to qualify for a TERA.[96] It also puts the burden on the Secretary to explain why a TERA was denied.[97] The bill is still waiting for approval from the Senate.[98]

B. Federal Regulation of Fracking is Improper

The proposed BLM rule is the most recent legislation dealing with tribal energy development. While Congress has attempted—albeit unsuccessfully—to increase tribal self-determination and self-governance, the proposed BLM rule is one large step backwards as it will impose more burdensome federal regulations in a time when tribes should be empowered to make more decisions about energy development on their land. By imposing more bureaucratic red tape, the federal government is effectively discouraging natural resource development on tribal lands. Empowering tribes to manage fracking locally is not an anomaly; in fact, fracking is currently regulated at the state and municipal level. This system is desirable, and its reasoning should be applied to tribal regulation on their lands. Additionally, the proposed BLM rule improperly ignores tribal self-governance.

1. Local fracking regulations are desirable to federal regulations

Fracking regulation is complicated and is regulated by federal, state, and local governments. Currently, states bear most of the burden of regulation—and rightfully so. The reason why the federal government does not regulate fracking extensively is because the major federal environmental statutes, for example, the Safe Drinking Water Act ("SDWA"),[99] Clean Water Act ("CWA"),[100] Clean Air Act ("CAA"),[101] Resource Conservation and Recovery Act

wyoming-senator-heads-to-senate/article_143ded55-e0c9-5296-bfed-f38ca6a26e6c.html.

96. Royster, *supra* note 94, at 126.

97. *Id.* at 127.

98. Voge, *supra* note 95.

99. 42 U.S.C. §§ 300f–300j(26) (2012).

100. 33 U.S.C. §§ 1–3857.

101. 42 U.S.C. §§ 7401–7671(q).

("RCRA"),[102] and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[103] all provide key exemptions for fracking, although the SDWA and the CWA regulate fracking to a limited extent. In 2005, Congress passed the Energy Policy Act of 2005, which limited the SDWA to apply only to fracking operations where diesel fuels are used—which is quite uncommon.[104] Similarly, federal regulation under the CWA is limited; it applies mostly to the disposal of fracking wastewater, which has a high concentration of dissolved solids and chemicals, into treatment works that flow into navigable waters.[105]

In the absence of federal agency authority, states have assumed the responsibility of regulating fracking within their borders.[106] When there are gaps in state regulation, municipal governments set up their own regulations.[107] However, many people and organizations, such as environmental groups, have been urging for an increased role for the federal government.[108] For example, ever since the passage of the Energy Policy Act of 2005, environmental groups have lobbied for the passage of the Fracturing Responsibility and Awareness of Chemicals Act of 2011 (the "Frac Act"), which would repeal the fracking exception in SDWA and require fracking operators to disclose fracking chemicals.[109] Many environmentalists urge increased federal regulations because of states' perceived "nonchalant attitude[s] towards environmental concerns."[110] Despite the Blackfeet Department of Commerce's claim that "[h]orizontal drilling is very environmentally friendly,"[111] there are

102. 42 U.S.C. §§ 6901–6992(k).

103. 42 U.S.C. §§ 9601–75.

104. Rebecca Jo Reser, *State and Federal Statutory and Regulatory Treatment of Hydraulic Fracturing*, 80 DEF. COUNS. J. 90, 97 (2013).

105. *Id.* at 98–99.

106. Robert H. Freilich & Neil M. Popowitz, *Oil and Gas Fracking: State and Federal Regulation Does Not Preempt Needed Local Government Regulation*, 44 URB. LAW. 533, 540 (2012).

107. *Id.*

108. Reser, *supra* note 104, at 100.

109. *Id.*

110. Heather Ash, Note, *EPA Launches Hydraulic Fracturing Study to Investigate Health and Environmental Concerns While North Dakota Resists Regulation: Should Citizens Be Concerned?* 87 N.D. L. REV. 717, 733 (2011).

111. *Frequently Asked Questions Oil and Gas*, BLACKFEET DEP'T COM., http://www.blackfeetcommerce.com/faqs_oil.html (last visited Nov. 3, 2012).

many who disagree. The most frequent complaint is water contamination. Most fracking fluid remains underground, and those living above shale reserves have noticed cloudy, smelly, and flammable drinking water.[112] Other problems include wastewater treatment and storage, chemical spills, air and noise pollution, monitoring and enforcement of best practices, and degradation and fragmentation of wildlife habitats.[113]

There are also fears of little-understood effects of fracking fluids and subsurface geology.[114] Earthquakes are on the rise; seismic events in the middle of the country averaged twenty-one per year from 1970-2000, then jumped to 50 in 2009, 87 in 2010, and 134 in 2011.[115] The U.S. Geological Survey ("USGS") stated that these earthquakes are "almost certainly man-made, and may be caused by wastewater from oil or gas drilling injected into the ground."[116] However, even the USGS acknowledges that there is no proof of a direct causation between the two.[117] Additionally, all the earthquakes so far have been low-magnitude and have been smaller than earthquakes caused by other projects such as the building of dams and geothermal projects.[118]

The fracking debate is frustrating because a lot of the "facts" promulgated by both sides are hyperbole or simply guesses. A 2010 documentary, *Gasland*, has been credited for catalyzing national activism against fracking.[119] The film, which has scenes of Pennsylvania residents who are able to light their drinking water on

112. Zachary Lees, *Anticipated Harm, Precautionary Regulation and Hydraulic Fracturing*, 13 VT. J. ENVTL. L. 575, 582 (2012).

113. *Id.* at 583.

114. *Id.*

115. Mark Drajem, *Fracking Tied to Unusual Ride in Earthquakes in U.S.*, BLOOMBERG.COM (Apr. 12, 2012, 1:32 PM), http://www.bloomberg.com/news/2012-04-12/earthquake-outbreak-in-central-u-s-tied-to-drilling-wastewater.html.

116. *Id.* (internal quotation marks omitted).

117. Matt Smith & Thom Patterson, *Debate over Fracking, Quakes Get Louder*, CNN.COM (June 15, 2012, 3:28 PM), http://www.cnn.com/2012/06/15/us/fracking-earthquakes/index.html.

118. Christopher Helman, *Should We Freak Out About Fracking-Induced Earthquakes?*, FORBES.COM (Jan. 10, 2012, 10:48 AM), http://www.forbes.com/sites/christopherhelman/2012/01/10/should-we-freak-out-about-fracking-induced-earthquakes/2/.

119. Jefferson Dodge, *'Gasland' Filmmaker to Speak at Local Anti-fracking Event*, BOULDER WEEKLY (Nov. 29, 2012), http://www.boulderweekly.com/article-10237-gasland-filmmaker-to-speak-at-local-anti-fracking-event.html.

fire and purports to "uncover[] a trail of secrets, lies and contamination"[120] has been accused of misstating the law and the process and falsifying information.[121] With so few scientific facts, it is difficult to determine the true impacts of fracking. The EPA will hopefully dispel some myths in a comprehensive study of the effects of fracking, due to be released for public comment and peer review in 2014.[122]

In the meantime, there is no reason why the federal government should step in to regulate fracking. The BLM proposed rule, and any federal legislation proposing to increase federal authority over fracking, "hews to the precautionary principle of regulating under scientific uncertainty."[123] The precautionary principle suggests that regulators should anticipate environmental harm, and rather than await scientific certainty, they should act to ensure that the harm will not occur.[124] Usually environmental laws weigh caution against risk,[125] both of which assume that there is sufficient knowledge to understand the risks and the appropriate benefits.[126] With such a lack of scientific knowledge about fracking, it is almost impossible to know what level of environmental regulation is reasonable.[127]

However, in this case, there is a high risk of overregulation, especially since there are many myths about the true environmental impacts of fracking. In fact, there is almost no knowledge about the true risks of the practice. Especially when the economic rewards of fracking are so great, the risks of overregulation can be devastating,[128] especially to tribes. Compliance with the proposed

120. GASLAND, http://www.gaslandthemovie.com/about-the-film (last visited Nov. 30, 2012).

121. DEBUNKING GASLAND, http://www.energyindepth.org/debunking-gasland/ (last visited Nov. 30, 2012).

122. *Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources*, EPA.GOV (Nov. 27, 2012), http://www.epa.gov/hfstudy/.

123. Joseph A. Dammel, Note, *Notes from Underground: Hydraulic Fracturing in the Marcellus Shale*, 12 MINN. J.L. SCI. & TECH. 773, 804 (2011).

124. *Id.*

125. *Id.*

126. INTERPRETING THE PRECAUTIONARY PRINCIPLE 205 (Timothy O'Riordan & James Cameron, eds., 1994).

127. *Id.* at 206.

128. One recent example of overregulation in the oil and gas industry is the six-month drilling moratorium that was recommended by the Obama Administration after the Deepwater Horizon oil spill. It costs thousands of jobs and caused severe economic harm in the Gulf of Mexico region. *See, e.g., Oversight: Obama Admin. Decision to Include Gulf Drilling Moratorium in DOI*

BLM rule will be prohibitively expensive for many tribes. The Western Energy Alliance estimated that the cost for new permits and workovers could range from $1.499 billion to $1.615 billion annually.[129] This money will divert resources away from energy development, job creation, and economic growth in states and on tribal lands.[130] Even more detrimental for Indian tribes is the delay caused by permits and paperwork. This, in turn, leads to significant costs for operators and investors, precluding them from developing additional resources on impacted land.[131]

Moreover, state, local, and tribal fracking regulations are simply more desirable to federal regulation. The president of the Independent Petroleum Association of America pointed out that the federal regulations would mandate a one-size-fits-all rule on fracking operations, which is illogical.[132] Oil and gas deposits and water tables are found at different depths, and surface characteristics are different depending on the formation.[133] Such geographic characteristics of oil and gas reserves vary from state to state, and state officials are more knowledgeable about local and regional production techniques than federal agencies.[134] On-the-ground knowledge leads to more effective regulation—regulation that is more specifically tailored to the characteristics of reserves in the location.[135] Because state officials are politically accountable to local residents, they will likely be more receptive to local concerns.[136]

Similar to state officials, tribal leaders are armed with more information about the true significance of a site, the environmental impacts noticed over time, and the economic needs of a tribe. The

Report, NAT'L RES COMM., http://naturalresources.house.gov/oversight/moratorium/ (last updated Aug. 1, 2012).

129. Karen Boman, *Study: Fracking Rule on Federal, Indian Lands Could Cost More Than $1.6B*, RIGZONE (June 12, 2012), http://www.rigzone.com/news/article.asp?a_id=118546.

130. *Id.*

131. *Id.*

132. John M. Broder, *New Proposal on Fracking Gives Ground to Industry*, N.Y. TIMES (May 4, 2012), http://www.nytimes.com/2012/05/05/us/new-fracking-rule-is-issued-by-obama-administration.html?_r=0.

133. Marin Katusa, *Another Layer of Bureaucracy for Oil and Gas Exploration in the US?*, 321 ENERGY (Nov. 7, 2012), http://www.321energy.com/editorials/casey/casey110712.html.

134. Matt Willie, Comment, *Hydraulic Fracturing and "Spotty" Regulation: Why the Federal Government Should Let States Control Unconventional Onshore Drilling*, 2011 BYU L. REV. 1743, 1772.

135. *Id.* at 1773.

136. *Id.*

environmental and social costs of fracking on tribal lands differ from tribe to tribe—and often within each tribe. For example, while many tribal leaders support fracking, there has been solid opposition by those who worry about both religious and environmental consequences. On the Blackfeet reservation, both the Waters of the Blackfeet[137] and the Blackfeet Anti-Fracking Coalition[138] host Facebook pages with information about the dangers of fracking, updates on fracking operations on tribal lands, and details about events and meetings. Opinions on fracking on Indian lands are hardly uniform, although it is paternalistic to believe that tribes will not be able to resolve these conflicts without the federal government. In the words of the chairman of the University of Montana's Native American Studies program, tribes are more sensitive to the need to "balance environmental protection, cultural preservation and economic development" when it comes to fracking.[139]

2. The proposed BLM rule improperly ignores the doctrine of self-determination

Many tribal representatives commented during the note-and-comment period of the proposed rule that increased federal regulation violates tribal sovereignty because Indian lands are not public lands.[140] In the Federal Land Policy and Management Act,[141] Congress charged the BLM with authority to regulate oil and gas activities on public lands, but not on Indian lands. The BLM's assertion of jurisdiction over tribal lands is an overextension of its authority and contradicts Congress's policy of self-determination and self-governance for tribes.[142]

137. *Waters of the Blackfeet*, FACEBOOK, http://www.facebook.com/pages/Blackfeet-Women-Against-Fracking/274135685996920 (last visited Mar. 29, 2013).

138. *Blackfeet Anti-Fracking Coalition*, FACEBOOK, http://www.facebook.com/pages/Blackfeet-Anti-Fracking-Coalition/256172387736753 (last visited Nov. 28, 2012).

139. Tristan Scott, *Blackfeet Tribe Signs with Company to Treat, Recycle 'Fracking' Water*, THE MISSOULIAN (Mar. 27, 2012 9:30 PM), http://missoulian.com/news/state-and-regional/blackfeet-tribe-signs-with-company-to-treat-recycle-fracking-water/article_30a26474-7880-11e1-8065-0019bb2963f4.html.

140. *Indian Tribal Leaders Raise Concerns About Lack of BLM Consultation with Tribes During Hydraulic Fracturing Rulemaking*, NAT'L RES. COMM. (Apr. 19, 2012), http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=291083.

141. 43 U.S.C. §§ 1701–82 (1976).

142. Fredericks & Aseff, *supra* note 22, at 123–24.

It does not make sense to impose more federal regulations and more bureaucracy when congressional policy has favored greater tribal control. Throughout the twentieth century, Congress has continuously expanded tribal control over energy resources.[143] By eliminating the Secretarial approval for energy development, ITEDSA and the proposed ITEDSA Amendments take away some control that the Secretary of the Interior had over leasing on tribal lands. While there has not been a challenge to ITEDSA, it is likely that courts will hold it more comparable to the coal leasing statutes in *Mitchell* because like the coal leasing statutes in that case, ITEDSA does not have elaborate control over natural resources. Thus, the United States likely has no affirmative duty to manage fracking to the benefit of the tribes and thus, tribes can manage it on their own.

Congress's intent to increase self-governance was blatantly disregarded in the rulemaking process. Tribes were inadequately consulted in the proposed BLM rulemaking process, violating federal statutes that mandate their participation in such decisions.[144] The BLM recognized that it needed to consult with Indian tribes, although its efforts were minimal. The agency held four tribal consultation meetings, inviting over 175 tribes.[145] Twenty-four tribes ended up attending the meetings, and most tribal officials dismissed them as "mere 'informational sessions' that didn't give them a chance to contribute to the rulemaking."[146] Response from tribes has been overwhelmingly negative during the two comment periods allotted to evaluating the proposed rule and at congressional hearings. At a congressional hearing in front of the House Natural Resource Committee's Subcommittee on Indian and Alaska Native Affairs, every native tribe testified that they do not want the proposed rule to apply to their lands.[147] The BLM representatives at one point left the room while Indian tribes testified on the impacts

143. Tanana & Ruple, *supra* note 29, at 35.

144. Ellen M. Gilmer, *Hydraulic Fracturing: Tribes Push for More Consultation on BLM Rule*, MHA NEWS (June 26, 2012), http://www.mhanation.com/main2/Home_News/Home_News_2012/News_2012_06_June/news_2012_june26.html.

145. DEP'T OF THE INTERIOR, OIL AND GAS; HYDRAULIC FRACTURING ON FEDERAL AND INDIAN LANDS, *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/hydraulicfracturing.Par.91723.File.tmp/HydFrac_SupProposal.pdf.

146. Gilmer, *supra* note 144.

147. Don Yong, *Rep. Young Speaking in Support of His Fracking Amendment*, YOUTUBE.COM (May 16, 2012), http://www.youtube.com/watch?v=EwcLLsjEDCw.

of the rule on their energy development.[148] But the issues raised by the tribes in absence of BLM representatives were important; for example, the chairman of the Three Affiliated Tribes, Tex Hall, argued that the BLM has jurisdiction to regulate activities on public lands, but not on Indian lands, which are not public lands.[149] He argued that "[l]ack of consultation equals lack of respect. [The tribes] are sovereign nations; the actions of these federal agencies are illegal and disrespectful."[150] If tribes are hindered from energy development and blocked from the consultation process, self-determination and self-governance are frustrated, completely undermining congressional intent and preventing federal statutes such as TERAs from being at all effective.

III. ENVIRONMENTAL CONSIDERATIONS OF FRACKING ON TRIBAL LANDS

A second major reason that tribes must regulate fracking on their lands is that there is no comprehensive application of environmental programs on tribal lands.[151] Environmental regulation on tribal lands is characterized by "ill-defined relationships between tribes, states, the federal government, and private business" which results in "jurisdictional uncertainties and . . . overlapping and conflicting regulatory schemes [which] are counterproductive to sound environmental regulation and efficient resource and business development."[152] This is due to the fact that regulatory power varies depending on various factors, such as whether the land is owned in trust or in fee and the status of the tribe involved.[153] On most lands, federal agencies, such as the EPA, end up enforcing environmental statutes—or rather, trying to enforce them. This Part will begin by explaining the current regulatory environment. It will then explain

148. *Id.*

149. Eloise Ogden, *Hall Challenges Bureau: Tribal Chairman Questions BLM Authority to Regulate Fracking on Reservations*, MINOT DAILY NEWS, Apr. 21, 2012, *available at* http://minotdailynews.com/page/content.detail/id/564963/Hall-challenges-bureau—Tribal-chairman-questions-BLM-authority-to-regulate-fracking-on-reservations.html?nav=5010.

150. Ellen M. Gilmer, *Hydraulic Fracturing: Tribes Roundly Reject Proposed Federal Fracking Rules*, MHA NEWS (May 15, 2012), http://www.mhanation.com/main2/Home_News/Home_News_2012/News_2012_05_May/news_2012_may15.html.

151. Benjamin A. Kahn, *Separate and Unequal: Environmental Regulatory Management on Indian Reservations*, 35 SPG ENVIRONS ENVTL. L. & POL'Y J. 203, 205 (2012).

152. Walter E. Stern, *Environmental Regulation on Indian Lands: A Business Perspective*, 7 NAT. RES. & ENV'T 20, 20 (1993).

153. *Id.*

the current regulatory system's shortcomings, and it will argue that for similar reasons, federal agencies should not be entrusted with regulating fracking on tribal lands.

Tribes have the authority to create and enforce environmental law on their lands from their retained sovereign power or from express delegation in federal environmental statutes. In general, the federal government has a statutory obligation to delegate authority to tribes to administer environmental programs on tribal lands.[154] When the statute, such as RCRA, is silent about regulation, tribes have the authority to regulate the environment on their lands without restriction, because of their retained sovereign power.[155] Additionally, many federal statutes, such as the SDWA and the CWA, authorize the EPA to treat tribes as states ("TAS"). For example, the SDWA provides that a tribe may assume primary enforcement responsibility for Underground Injection Control, a system to regulate pollutants by injection wells into underground water, which forbids the injection of anything that would endanger drinking water sources.[156] Another example is the CWA, which provides that tribes may establish Water Quality Standards just like states.[157]

The EPA ends up regulating most of the federal environmental statutes because most tribes do not qualify for the TAS program. Out of the 565 federally-recognized tribes, only forty-eight have been approved for the CWA TAS program. Scholars' opinions vary for the reasons for such low numbers, but many have argued that the management requirements automatically exclude many tribes from qualifying.[158] According to the SDWA, the tribes are treated as states only if they are able to prove certain things, such as a statement describing the capability of the tribe to administer an effective program and a description of the tribe's previous management experience.[159] Similarly, the CWA provides that tribes are to be treated as states only if they have "a governing body carrying out substantial governmental duties and powers" and

154. Kahn, *supra* note 151, at 205.

155. *Id.* at 215.

156. *Phillips Petrol. Co. v. EPA,* 803 F.2d 545 (10th Cir. 1986).

157. 33 U.S.C. § 1377(a) (2012).

158. Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State,* 36 WM. MITCHELL L. REV. 533, 547–48 (2010).

159. 40 C.F.R. § 131.8 (2010).

"reasonabl[e]. . . capab[ility]. . . [to carry] out the functions to be exercised."[160] Thus, if the tribe is poor or has no relevant experience managing a similar program, they cannot qualify.[161]

Even if the tribe is treated like a state, its environmental regulatory scheme may not be adequate to address cleanup, inspections, and other issues since federal funding is limited. If the tribes are able to meet the TAS standard, they get federal funding to help achieve the ability to regulate environmental programs on their own. This funding is not always adequate, however. The CAA for example, excludes tribes from minimum state funding entitlements,[162] and the SDWA allocates to Indian tribes just five percent of the amount allocated to states for Underground Injection Control programs.[163] These discrepancies must be eliminated because tribal lands are vulnerable to environmental disasters and because federal agencies cannot effectively regulate.

Tribes that cannot meet TAS requirements cannot regulate certain environmental risks that result from non-Indian activities on Indian lands, which lead to environmental disasters on tribal lands. Lax enforcement of environmental regulations has created a situation where non-Indian polluters, such as oil and gas operations, are incentivized to pollute on tribal lands.[164] One example is wastewater released by oil companies onto lands. The EPA has an exception for wastewater dumped in western states; if oil companies can demonstrate that ranchers of wildlife will use the wastewater, then they can release it on lands.[165] With time, states' rules became stricter than the EPA's, and some have outlawed dumping all together.[166] However, the Wind River Reservation, controlled by the EPA, still allows dumping of wastewater on a case-by-case basis.[167] Some of this waste includes chemicals from fracking. The air reeks of rotten eggs and the water contains toxic chemicals including

160. 33 U.S.C. § 1377 (e)(1–3).

161. Kahn, *supra* note 151, at 208.

162. *Id.* at 220.

163. *Id.* at 221.

164. Roger Romulus Martella Jr., Note, "*Not In My State's Indian Reservation"—A Legislative Fix to Close an Environmental Law Loophole*, 47 VAND. L. REV. 1863, 1865–66 (1994).

165. Elizabeth Shogren, *Loophole Lets Toxic Oil Water Flow Over Indian Land*, NPR.ORG (Nov. 15, 2012), http://www.npr.org/2012/11/15/164688735/loophole-lets-toxic-oil-water-flow-over-indian-land.

166. *Id.*

167. *Id.*

carcinogens and radioactive materials.[168] While in most of the country, oil companies would re-inject this water underground where it cannot cause harm, on the reservation there is no incentive to do so, and thus, native people are suffering the consequences.[169] Wes Martel, of the Eastern Shoshone tribe, argued that the only solution is for tribes to step in and take charge of their oil fields, which would help them make all available profits, not just royalties, and better allow them to protect water quality for future generations.[170]

The EPA's limited resources have prevented it from being an effective regulator of tribal lands. For example, more than half of all facilities on tribal lands that were granted a CAA emissions permit "appear to have never been inspected."[171] There is no reason to expect the BLM's proposed regulation of fracking on Indian lands to be any different. For example, in New Mexico, the BLM oversees more than 30,000 active wells but only has sixty-nine inspectors.[172] If the agency is indeed understaffed and unable to enforce its policies, and if there is no corresponding regulation by the tribe which lacks funding, then there will be no efficient fracking regulation at all.

This is most likely a violation of the federal government's obligations to tribes. The trust relationship obligates the government to protect the health and welfare of Indian people.[173] Courts have also suggested that there even might be an implied right to environmentally safe reservation land.[174] For example, the EPA and the Bureau of Indian Affairs have a duty to help clean contamination caused from fourteen dump sites located on the Pine Ridge

168. *Id.*

169. *Id.*

170. *Id.*

171. *Native Americans and the Environment*, ENV'T, HEALTH, & SAFETY ONLINE, http://www.ehso.com/ehshome/Native%20Americans%20and%20the%20Environment.htm (last visited Nov. 28, 2012).

172. Lena Groeger, *40 Acres and a Rule: Draft Federal Fracking Regs Cover Only a Sliver of Land*, PROPUBLICA (May 8, 2012, 10:04 AM), http://www.propublica.org/article/40-acres-and-a-rule-draft-federal-fracking-regs-cover-only-a-sliver-of-land.

173. Kahn, *supra* note 151, at 211.

174. *Id.*

Reservation.[175] Agencies are required to enforce environmental statutes consistent with their trust obligation to tribes, and when there is a violation, they must take affirmative steps to remedy the problem, even when others contributed to it, and even when environmental statutes do not clearly set forth their obligations.[176]

Instead of throwing more responsibility to agencies like the EPA and BLM, the federal government should empower tribes to regulate environmental statutes—and thus, fracking—on their own. Granted, it will not be easy for the tribes to develop a "comprehensive environmental regulatory code that would cover its air shed, its waters, its wildlife, as well as its traditional cultural resources."[177] Therefore, the federal government must assist tribes with financial and administrative support to strengthen their ability to create and enforce their own environmental laws because this will further congressional policies of self-determination and self-governance. It will give the tribes the ability to regulate the environment at the level they find appropriate.

This is not a radical proposal. The EPA itself affirms in its Indian Policy that the agency should "take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands."[178] Congress has also recognized that tribal sovereignty means increased control over resources. ITEDSA provides for TERAs, and most environmental statutes provide for TAS provisions, which all purport to give tribes more responsibility for their environmental laws.

Agencies must make it a priority to support tribes in attaining TERA and TAS. While the proposed ITEDSA amendments may help more tribes achieve the ability to obtain TERA, it is still uncertain whether it will be passed into law. In the meantime, the federal government should not attempt to regulate fracking on tribal lands. It must give tribes more funding to reach TAS standards, so that they will be eligible for the same funding programs given to states in

175. *Id.* (citing Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1101 (8th Cir. 1989)).

176. *Id.*

177. Raymond Cross, *Development's Victim or its Beneficiary?: The Impact of Oil and Gas Development on the Fort Berthold Indian Reservation*, 87 N.D. L. REV. 535, 554 (2011).

178. Kahn, *supra* note 151, at 217 (quoting William D. Ruckelhaus, EPA Policy for the Implementation of Environmental Programs on Indian Reservations (Nov. 8, 1984), *available at* http://www.epa.gov/superfund/community/relocation/policy.htm).

statutes such as the CAA and SDWA. If tribes are empowered to develop their own environmental laws, they will be equipped to address new challenges brought on by emerging technologies, such as the combination of fracking and horizontal drilling, based on the tribal land's unique geological composition. Only with greater authority over their energy development will Congress's goals of increasing tribal sovereignty be truly achieved.

IV. RELIGIOUS CONSIDERATIONS OF FRACKING ON TRIBAL LANDS

Tribes should regulate fracking for a third and final reason. Many tribes believe that land is sacred, and since fracking involves an intrusion on the land, tribes are best equipped to understand the religious implications of such actions. The lands in question may be more than just lands[179]—they may be sacred sites with religious significance.[180] Many Indian religions hold that "certain geographical sites or physical formations . . . are held to be "sacred" as an integral part of the religion."[181] The relationship to sacred lands can be misunderstood. Religious exercises at sacred sites are not simply about obtaining a "spiritual peace of mind"; their importance is "more about the continuing existence of Indians as a tribal people."[182] There are different reasons why places may be holy; they may contain specific plants, they may be the dwelling place of spiritual beings, or they may contain burial grounds.[183] In general,

179. *See, e.g.*, Michelle Kay Albert, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 COLUM. HUM. RTS. L. REV. 479 (2009); Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475 (2005); Peter J. Gardner, *The First Amendment's Unfulfilled Promise in Protecting Native American Sacred Sites: Is the National Historic Preservation Act a Better Alternative?*, 47 S.D. L. REV. 68 (2002); Samantha M. Ruscavage-Barz, Note, *The Efficacy of State Law in Protecting Native American Sacred Place: A Case Study of the Paseo Del Norte Extension*, 47 NAT. RESOURCES J. 969 (2007); Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269 (2012).

180. For example, the Blackfeet tribe believes that the Sweet Grass Hills, located within the Badger-Two Medicine area in Glacier National Park, were made by the Creator and is the site of vision quests undertaken by teenage boys. Badger-Two Medicine Area, *National Trust for Historic Preservation*, NAT'L TRUST FOR HISTORIC PRES., http://www.preservationnation.org/issues/diversity/native-american-heritage-in-preservation/saved-places/badger-two-medicine-area.html (last visited Oct. 27, 2012).

181. Skibine, *supra* note 179, at 270.

182. *Id.* at 273.

183. *Id.* at 274 (citing U.S. DEP'T OF INTERIOR, P.L. 95-341, AMERICAN INDIAN RELIGIOUS

the place where an event occurred is more important than the event itself.[184] The concept of sacred lands can be difficult to grasp for adherents to Western religions where holy places are characterized by structures instead of the land itself.[185] In Native American culture, destruction of a sacred site is a "cataclysmic event" because a deity is vulnerable to changes in its physical habitat.[186]

If the BLM regulates fracking, there is a strong likelihood that sacred sites will be destroyed. While not all tribe members share beliefs about land (indeed, some, such as Ron Crossguns,[187] emphatically deny these beliefs), tribes should be able to resolve these matters internally—a fundamental notion under the doctrine of self-governance. Indian tribes generally have not been successful arguing for injunctive relief against agencies pursuing development options on sacred sites. In the seminal case, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the United States Forest Service prepared a final environmental impact statement for the construction of a new paved road through land that had historically been used by tribes for religious rituals that depend on an undisturbed natural setting.[188] The Forest Service had found earlier that, to the tribes, the entire area was significant.[189] Even though the paved road would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," the individuals affected would not be *coerced* by the government action to violate their religious beliefs.[190]

In the past, the tribes have benefited from the non-coercion doctrine. For example, in *Bear Lodge Multiple Use Ass'n v. Babbitt*, the National Park Service issued a management plan imposing a voluntary ban on rock-climbing during the culturally significant month of June on Devil's Tower National Monument, out of respect for Indian tribes.[191] The district court and the Tenth Circuit upheld

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FREEDOM ACT REPORT 52 (1979)).

184. Sarah B. Gordon, Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1449 (1984–1985).

185. Gardner, *supra* note 179, at 76.

186. Gordon, *supra* note 184, at 1449.

187. *See supra* Part I.

188. 485 U.S. 439, 442 (1988).

189. *Id.*

190. *Id.* at 449.

191. 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998), *aff'd* 175 F.3d 814 (10th Cir. 1999).

the voluntary ban because it was merely an accommodation for tribes that did not have an impermissible coercive effect on climbers, who were still allowed meaningful access to the land.[192] However, more recently, the Ninth Circuit upheld the government's approval of the use of artificial snow containing small amounts of human waste on a mountain for skiing purposes, despite a tribe's protest that the use of wastewater snow desecrated the entire mountain, a sacred site.[193] The court held that the sole effect of the snow would be to diminish the tribe's subjective spiritual experience.[194] The government's actions did not coerce the tribe to act contrary to their religious beliefs because they could still access the mountain as before.[195] Diminution of spiritual fulfillment is not a substantial burden on the free exercise of religion[196]—a holding which could be detrimental to those tribe members trying to protect certain lands from drilling.

V. CONCLUSION

Fracking on Indian lands brings up pressing issues of tribal sovereignty, inadequate environmental regulations, and concerns over harming sacred sites. Tribes are torn between the urgent need to stimulate their economies and alleviate high poverty rates while protecting their environment and respecting their sacred lands. Business Council Co-chairman for the Eastern Shoshone tribe, Wes Martel, suggests an increased regulatory role for tribes, with "the main goal . . . not be[ing] how quickly we can get permits approved but how do we support safe and responsible development."[197] The federal government must help tribes acquire the technical and administrative expertise to develop their ability to address these issues.[198] Indian lands should be exempt from future BLM regulations, and the federal government should assist tribal

192. *Id.* at 1455–56.

193. Navajo Nation v. U. S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008).

194. *Id.* at 1070.

195. *Id.* at 1070–71.

196. *Id.* at 1070 n.12.

197. Martin Reed, *Tribal Leader Tells Congress of Fracking Worry*, THE RANGER (May 8, 2012), http://dailyranger.com/story.php?story_id=1523.

198. *Id.*

governments in meeting TAS standards and TERAs and then ultimately in creating their own fracking regulation that balances tribes' environmental, economic, and religious needs.

In response to these concerns, Rep. Don Young (R-AK) introduced H.R. 3973, the Native American Energy Act, which seeks to "reduc[e] Federal regulations that impede tribal development of Indian lands"[199] by giving tribes options to waive appraisals such as the proposed BLM rule. The bill passed the House Natural Resources Committee in May 2012.[200] This bill is a step in the right direction of allowing greater tribal control over natural resources decisions. Tribes in general *want* to have more control over their resources. For example, recent oil and gas exploration on the Blackfeet reservation has led the tribe to obtain TAS standards under the CWA in order to better protect its rivers, lakes, and wetlands from drilling activity.[201]

Tribes that are responsible for their decisions perform better in terms of economic development.[202] A study of tribes taking control over forest management, which is somewhat analogous to energy development because it involves natural resources, demonstrates that tribes excel when they are allowed to exercise greater discretion and decision-making authority.[203] The tribal attorney for the Southern Ute Indian Tribal Chairman stated:

> The Southern Ute Tribe believes . . . that Congress should be concerned with whether or not the tribes are capable of making informed decisions in the first place and if they are capable of making those informed decisions, they should take the responsibility for their mistakes as well as for their good decisions.[204]

199. H.R. 3973, 112th Cong., 2d Sess. (2012), *available at* http://beta.congress.gov/bill/112th-congress/house-bill/3973/text.

200. Native American Energy Act (H.R.3973), NATURAL RES. COMM., http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=296902 (last visited Nov. 30, 2012).

201. Tristan Scott, *Blackfeet to Apply Federal Water Standards as Oil, Gas Exploration Increases*, THE MISSOULIAN (May 5, 2012), http://missoulian.com/news/local/blackfeet-to-apply-federal-water-standards-as-oil-gas-exploration/article_003d256a-965a-11e1-a860-001a4bcf887a.html.

202. Kronk, *supra* note 5, at 851.

203. *Id.* at 852.

204. *Id.* at 831.

If Secretarial approval for leases was not needed, tribes would be able to require oil and gas companies to assess the impact that exploration and drilling would have on sacred sites, for instance. This is nothing unique; environmental assessments typically require companies to do so already. The only difference would be that tribes would be more empowered to prohibit non-compatible uses,[205] especially since courts have been unsympathetic to banning activities that only affect subjective spiritual experiences.[206] This is not to say that the current environmental assessment process cannot achieve results in favor of protection of sacred sites[207] but that tribes face an uphill, uncertain battle when doing so, and they often lose, especially on procedural grounds.[208] If tribes had control over their energy resources, they would be able to regulate their lands as they saw fit—which is aligned with the policies of self-determination and self-governance.

The federal government may be hesitant to surrender too much control over energy resources on tribal lands, but in doing so, it will increase energy production in the country as a whole. While North

205. Albert, *supra* note 179, at 479.

206. *See supra* Part IV.

207. Perhaps the most famous example in the West of tribal interests prevailing in the protection of sacred spaces is the Weatherman Draw case from central Montana. *See* LYUBA ZARSKY, IS NOTHING SACRED? CORPORATE RESPONSIBILITY FOR THE PROTECTION OF NATIVE AMERICAN SACRED SITES 26–30 (2006), *available at* http://www.sacredland.org/PDFs/csr_dl.pdf. Anschutz Exploration Corporation planned to drill and improve a road that passed through land considered sacred. *Id.* at 28. The noisy traffic, oil workers, and increased non-native access would disturb the power of the spirits, bring harm to natives and non-natives alike, and would destroy petroglyphs in the area that would inevitably be the victim of vandalism. *Id.* The BLM approved the drilling of a single exploratory well in 2001, despite protest from the tribes. *Id.* Ten tribes joined together to appeal the decision, questioning whether the BLM had fulfilled its obligation to adequately consider the project's cultural impacts. *Id.* at 29. The BLM upheld Anschutz's right to drill for oil, so the tribes appealed the decision to the Department of the Interior, sought media coverage to bring national attention to the problem, and sought help from Congress, which introduced a bill to preserve Native American sites. *Id.* Only then did Anschutz *voluntarily* drop its oil-drilling plans and donate the leases to the National Trust for Historic Preservation. *Id.* at 30. This case, as positive of an example as it may be, is not typical. There are many variables: the fact that the tribes were able to get media access, congressional attention, and that the oil company was in the end willing to give up its leases. It is easy to imagine that a company with higher stakes would wait until the tribe appealed the administrative decision in federal district court, which would likely uphold the decision of the BLM.

208. *See, e.g.*, Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 608 F.3d 592 (9th Cir. 2010); Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207 (9th Cir. 2008); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008); San Juan Citizens Alliance v. Norton, 586 F. Supp. 2d 1270, 1292 (D. N.M. 2008); Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior, 547 F. Supp. 2d 1033 (D. Ariz. 2008).

Dakota and other states sitting on top of shale formations have seen oil production increase by 500% since President Obama took office, the Obama Administration's red-tape and burdensome regulations have made it impossible for similar energy production on federal or Indian lands.[209] President Obama himself aims to decrease America's dependence on foreign oil, and tribal lands hold a significant amount of resources that can be used to achieve that goal. The longer such regulations are allowed to hold up development of American onshore natural resources on tribal lands, the longer oil-rich tribes will be trapped in a cycle of poverty, unemployment, and hopelessness—and the further the nation will be in achieving President Obama's own goals of increasing American energy independence.

*Szonja Ludvig**

209. *Obama Administration American Energy Roadblocks Part 2: Hydraulic Fracturing on Federal Lands*, NATURAL RES. COMM. (Oct. 24, 2012), http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=311393.

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